Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-7861

GRANT MOGLE,

Petitioner,

v.

BOARD OF EDUCATION OF SEVIER COUNTY SCHOOL DISTRICT, ET AL.,

Respondents,

BRIEF OF RESPONDENTS OPPOSING ISSUANCE OF A WRIT OF CERTIORARI

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Respondents respectfully submit that a Writ of Certiorari should not issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case and support their position with the brief hereto annexed in accordance with Rule 24, Rules of the United States Supreme Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 540 F2d 478, and has been reproduced in the Appendix to the Petition for Certiorari at p. 2a. The unreported

final order of the District Court, issued without opinion, is reproduced at p. 1a of the Petition for Certiorari.

QUESTIONS PRESENTED

1. Does a contract condition agreed upon following negotiations that a school counselor reside within the school district present any substantial federal question or any question concerning the constitutionally-protected "right of interstate travel"?

2. If any substantial federal question *is* presented by such an agreement, is existence of a rational basis sufficient to justify residence as a condition to employment?

3. Can a rural School Board judge whether or not school counselors should reside in the proximity of the school they agree to serve?

STATEMENT OF THE CASE

FACTS

Petitioner was employed as a teacher on successive one-year contracts. When he was first employed in the capacity of a counselor—again on a one-year contract—he was told he would be expected to move into the "North Sevier" area where the school he was to serve was located. Petitioner agreed to a contract containing that provision.

Petitioner admitted in his deposition that at all times material to this case he was an active partner in a gasoline distributing company in the County of Sanpete where he lived. This fact undoubtedly influenced his decision to repudiate his contract.

Contrary to Petitioner's statement (p. 3 of the brief supporting Petition for Certiorari) that his contract was not renewed for the 1972-73 school year he *was* given a contract in which he agreed to move into the North Sevier area before the school year began. He was told, when he inquired, that the Board expected his compliance with that provision and then refused to report for work when the school year began.

Respondents filed affidavits with the District Court supporting their Motion for Summary Judgment enumerating many reasons why a counselor should live within the area of the school he served. These affidavits were uncontradicted. These are set out in the appendix to the opinion of the Court of Appeals of the Tenth Circuit. That Court observed that those reasons recited that:

> "They were based entirely and exclusively upon the necessity to obtain the services of a counselor who resided in close proximity to the school where he served and the compelling interest of having a counselor who did not have both his residence and substantial other outside employment and occupation in another community."

Other recitals in the affidavits are set out in the Circuit Court's opinion (Appendix) and they include the declarations that:

> The School District has had, at all times material to this action, a policy that counselors must reside in the proximity of the school where they serve and those are based upon the following considerations:

Certain services were not being provided students in the North Sevier High School attendance area because the counselor lived outside that attendance area;

It is difficult for parents and students to get in touch with the counselor because of the distance problem;

It is difficult for parents and students to become personally acquainted with the counselor;

It is more difficult because of folk-ways and mores for the counselor to become acquainted with the community and its problems and feelings are generated in the community that the counselor is an "outsider" and his allegiance to the high school is in jeopardy as the result of living in another county;

The counselor's knowledge of career opportunities is more limited because he is not living in the community and having first-hand knowledge of those career activities;

The counselor is unable to make any contribution of services to the community in civic and church activities, is not immediately available for personal contact by police officers, clergymen, doctors, principals, and other service agencies and a long distance phone call is required if a counselor is contacted at home by students or parents or both;

A counselor is responsible for cumulative records of the students and it is inconvenient for him to live a long distance from where the records are kept; there is a substantial demand

upon student record data in spring and early fall;

The Board of Education has and in 1972 had a policy, however, requiring guidance counselors to live in close proximity to the school where they are employed and the reasons therefor are that the school counselor is a psychological hub of the school from which all lines of communication extend to both the faculty and to the student body. The counselor's availability and familiarity with the local community are requisite to his effective performance. A commuter, and particularly one who has virtually full-time employment totally disassociated with his school's activities and also located in another community and one who would be, after school hours, totally preoccupied with the combined problems of commuting and the requirements of that disassociated and unrelated work, deprive those desiring his counseling services at critical moments. The counselor must be readily available to cope with crises the same as a fireman or a policeman. A student's unresolved problem such as a communication breakdown between a student and a faculty member requires immediate attention. A friend, a neighbor and a resident of the community can fulfill the role of counselor far more effectively than the commuter who maintains the distance he has established between his work involvement and the other world of his residency and his other occupation;

The problems created by commuting, distance and virtually full-time employment additional-

ly, prevent a face-to-face contact between the counselor and his students. Some home visits could otherwise be made if the counselor lived in the student residency area.

DECISIONS BELOW

The District Court granted Defendants' Motion for Summary Judgment which was based upon the foregoing affidavits, the substance of which was not countered. The only affidavits countering the reasons establishing the rational basis for the school policy were statements by Petitioner that in his opinion he could do his work as well as a resident of the North Sevier area. No affidavit was filed countering the rationality of the rule.

The District Court determined to base Summary Judgment on the ground that "no substantial federal question was involved" as this Court had held in *Detroit Police Officers Ass'n. v. City of Detroit, 405 U.S. 950, 92 S. Ct. 1173, 31 L. Ed.2d 227 (1972).*

The United States Court of Appeals for the Tenth Circuit affirmed, concluding that the reasons expressed in the affidavits upon which the motion was based demonstrated that the reasons why the residence provision was inserted in Petitioner Mogle's contract were not wholly insubstantial (540 F.2d 478).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner has no constitutional right to be employed by a municipal corporation while he is living elsewhere.

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S. Ct. 1154, ...L.Ed..... (1976).

Likewise, the policy of the District is not irrational. *Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed.2d 223.*

There is nothing in the record countering, opposing, or contradicting affidavits of the Respondents showing the rational basis for the rule that counselors reside in proximity of the school they serve.

Petitioner is not being denied employment because of any *durational residency requirement.* The Board did not ask any period of residency but only continuing residency. This is not an impingement upon Petitioner's constitutional "right to travel". *Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed.2d 306 (1974).*

The Respondents' requirement that school counselors reside in the District is uniformly applied and the reasons comprehensively expressed in the affidavits upon which the Motion for Summary Judgment was sustained by the Court of Appeals. Rules of this type are not irrational. *Detroit Police Officer's Ass'n. v. City of Detroit, supra.*

Appropriately defined and uniformly applied continuing residency requirements are not questioned by the leading cases relied upon by the Petitioner of *Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed.2d 600* or *Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed.2d 274* as those cases have been explained in *Memorial Hospital* and *McCarthy, supra.*

Petitioner's counsel openly admit in their brief and in other documents they have filed with this Court, particularly their application for extension of time within which to file a Petition for Writ of Certiorari, that they are not really interested in Mr. Mogle's particular situation but counsel for the National Educational Association, gratuitously furnishing legal services for Mr. Mogle, believe that a climate exists in which they should have a ruling of this Court that their members may hold higher-paid jobs in urban or city school districts and nevertheless reside in suburban or outlying areas.

We respectfully submit that this is not the case for such an examination of the law or a re-examination of the Court's prior opinions, many of which would have to be reversed if the National Education Association obtains the rule which it seeks by asking this Court for briefs and an argument on the extremely narrow issue which was correctly and dispositively resolved by the United States Court of Appeals for the Tenth Circuit.

We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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